

UPDATED FINAL STATEMENT OF REASONS

UPA CORRECTIVE ACTION QUALIFICATION

Department Reference Number R-97-11

Office of Administrative Law Notice File Number: Z-05-1004-12

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code section 11346.9(d), the Department of Toxic Substances Control (DTSC) incorporates by reference the Initial Statement of Reasons prepared for this rulemaking and the Final Statement of Reasons prepared for post-hearing changes for this rulemaking.

DTSC made post-hearing changes to the proposed text. DTSC considers these new changes to the rulemaking to be sufficiently related changes, as defined by California Code of Regulations, title 1, section 42. These changes were duly presented in a public notice for a 15-day review period.

ALTERNATIVES DETERMINATION

DTSC has determined that no alternative would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective and less burdensome to affected private persons than the proposed regulations.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any mandate on local agencies or school districts.

SUMMARY AND RESPONSE TO COMMENTS – Original Rulemaking

A summary and response to comments received for the original rulemaking follow:

Comment: All commenters suggested changing the definition of “less complex sites” in section 66840.12 to increase the amount of contaminated soil that can be removed from such sites as the selected remediation alternative. One commenter cited anecdotal information from soil removal projects at rural agricultural sites where excavations of 2 to 4 feet of soil depth resulted in volumes of 200 to 1,000 cubic yards. This commenter suggested changing the definition from 60 cubic yards to 200 or 2,000 cubic yards. Another commenter asserted that limiting Tier 1 oversight to the removal and disposal of 60 cubic yards of contaminated soil will prevent prompt remediation of

many sites, causing delays in business operations and placing public health at risk. This commenter suggested changing the definition to 500 or 1,000 cubic yards. Another commenter stated that a removal of 60 cubic yards is so small it rarely occurs. This commenter suggested changing the definition to at least 150 cubic yards since a removal of this size is still small and could be completed in one day with an excavator.

Response: In the proposed regulations, the Department of Toxic Substances Control (DTSC) sought to establish a level of qualifications that represent the absolute minimum technical requirements and related experience needed to understand and implement the most basic of corrective action activities. These qualifications are represented as the Tier 1 level of qualifications. This tier is intended to allow UPAs that seek only to address the most simple corrective action sites in their jurisdictions to become qualified to address those sites using the technical personnel and experience they are likely to currently possess.

The definition of “less complex sites” in the proposed regulations is intended to describe the most simple of corrective action sites and includes restrictions on the types of constituents present, the type of remediation alternative that can be used, and level of risk allowed. The specified soil removal amount was selected in part to reflect the most simple type of corrective action site and activity, and in part because the corrective action requirements for less complex sites include a reduced level of public notice and participation.

DTSC envisioned the less complex sites as small excavations, approximately the size of an average swimming pool, resulting from an occasional or one-time release that would impose minimal traffic and transportation impacts on surrounding streets and neighborhoods. The soil amount of 60 cubic yards was selected because it was estimated to result in about four truckloads of soil to be removed from a site (assuming an end dumping truck with an average soil capacity of 15 cubic yards) and could be accomplished in a day or two with minimal associated impacts. Because the soil amount is measured *in situ*, the actual number of trucks may be slightly higher since excavated soil usually occupies a larger volume than soil *in situ*.

Other corrective action activities may be simple but not small, or resulting from historical releases. These are not the types of sites DTSC intended to include in the definition of “less complex sites.” A simple, but larger site could impose transportation impacts over a longer time period and potentially result in traffic congestion and other impacts on the environment. Such impacts would require a higher level of public notification and participation. A site resulting from an historical release could potentially require more

sophisticated site characterization, confirmation sampling in subsurface soils and more extensive removal or remedial actions.

The second tier of qualifications, Tier 2, was developed for the UPA that has a higher level of technical expertise and experience and that intends to oversee other types of corrective action activities. DTSC believes that larger and more complex sites would best be addressed by an UPA able to demonstrate Tier 2 qualifications.

No change is made on the basis of this comment.

Comment: The regulations should clarify the terms “immediately” and “coordinate” in section 68400.11(e). An UPA should be given 24 hours to notify DTSC, but 48 to 72 hours may be more reasonable.

Response: DTSC believes that the UPA should notify DTSC as soon as possible after discovering a release or threatened release at the specified types of facilities since these are facilities at which an UPA would not be qualified to conduct or oversee corrective action and DTSC must determine the appropriate corrective action activity. Ideally, such a notification would occur within at least 24 hours, but in some instances a longer time period may be needed. DTSC believes the wording of “immediate notification” adequately encompasses both of these situations. Specifying a time limit may result in unnecessary delay.

Such a facility may also contain a unit at which an UPA may be qualified to conduct or oversee corrective action (such as the units specified in the proposed regulation) and the term “coordinate” refers to the need for DTSC and the UPA to determine together which agency will conduct or oversee corrective action at the various units at the facility. This could potentially be quite complex, and DTSC believes the term “coordinate” in its common usage best describes the necessary level of cooperation that must take place in this situation. The term “negotiate” was considered but rejected as implying a more adversarial than cooperative relationship.

No change is made on the basis of this comment.

Comment: In section 68400.11(f)(1), the phrase “If the Department determines that a qualified UPA has not adequately implemented or enforced environmental assessment or enforcement action requirements” should be rephrased as “If the Department

determines that additional assessment or corrective action is necessary” to allow DTSC to issue and order at any time, not only when an UPA failed to take appropriate action.

Response: DTSC believes that the existing wording is general enough to allow DTSC to issue an order at any time. If DTSC determines that additional assessment or corrective action is necessary, it will have made the determination that the UPA has not adequately implemented or enforced the requirements of the proposed regulations. DTSC believes that the determination of “adequate implementation or enforcement” is more general than the determination that “additional assessment or corrective action is necessary.”

No change is made on the basis of this comment.

Comment: The requirement in section 68400.11(j) that risk assessments, etc, be “conducted” by certified professionals should be changed to “approved.”

Response: The requirement that risk assessments and toxicological interpretations, conclusions and recommendations be conducted by qualified toxicologists with the specified qualifications is the standard that DTSC uses for its own risk assessments and toxicological work. To ensure consistency in corrective action throughout the state, DTSC based the UPA qualifications on its own personnel qualifications. Furthermore, the final approval of risk assessments and other toxicological work should be left to the regulatory agencies.

No change is made on the basis of this comment.

Commenters:

Jeff Willett, 10/20/05 via electronic mail
jwillett@condorearth.com
Condor Earth Technologies, Inc.
188 Frank West Circle, Suite I
Stockton ,CA 95206

Jeff Willett, 11/28/05 via electronic mail
jwillett@condorearth.com
Condor Earth Technologies, Inc.
188 Frank West Circle, Suite I
Stockton ,CA 95206

Dick Wilson, 11/28/05 via electronic mail
DWilson@anaheim.net
Anaheim Public Utilities Department

Lewis J. Pozzebon
City of Vernon
4305 Santa Fe Avenue
Vernon, CA 90058

SUMMARY AND RESPONSE TO COMMENTS – Post-Hearing Changes to the Original Rulemaking

A summary and response to the comment received for the post-hearing changes to the original rulemaking follow:

Comment: The regulations should include a requirement that any remedial plan must apply the federal cleanup standards in which effective treatment is favored over offsite transportation and disposal. State law requires that a remedial action plan shall consider the federal cleanup factors (Health and Safety Code Section 25356.1(d)(3) and (6)).

Response: The comment is outside the scope of the post-hearing amendments. In addition the requirement cited applies to remedial action undertaken pursuant to Chapter 6.8 of the Health and Safety Code, whereas corrective action is undertaken pursuant to Chapter 6.5 of the Health and Safety Code.

No change is made on the basis of this comment.

Commenter:
Nabil H. Yacoub, Sr. HSS
Tiered Permitting Corrective Action Branch
Department of Toxic Substances Control
5796 Corporate Ave.
Cypress, CA 90630